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THE NATIONAL LABOR RELATIONS ACT MUST BE REVISED TO PRESERVE INDUSTRIAL DEMOCRACY

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I. INTRODUCTION

When Congress enacted the National Labor Relations Act (NLRA)[1] in 1935, it specifically indicated in Section 1 that "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest ...."[2] Congress further emphasized "[t]he inequality of bargaining power between employees who do not possess full freedom of association ... and employers who are organized in the corporate [form] ...."[3] It was declared to be the policy of the United States to alleviate these problems "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other

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1. 49 Stat. 449 (1935). The NLRA, as amended by the Labor–Management Relations Act, Pub. L. No. 80–101, 61 Stat. 136 (1947), and the Labor–Management Reporting and Disclosure Act, Pub. L. No. 86–257, § 101 (d)–(e), 73 Stat. 519, 525 (1959), is set forth in 29 U.S.C. §§ 151–169 (1988).

2. *Id.*

3. *Id.*

mutual aid or protection."[4] The Supreme Court acknowledged the propriety of this theme when it sustained the constitutionality of the NLRA:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.[5]

The NLRA has provided significant rights for millions of American workers. Over thirty-three million employees have voted in the 345,000 representation elections conducted by the National Labor Relations Board (NLRB or Labor Board) since 1935.[6] The NLRB has processed almost 800,000 unfair labor practice charges and has issued more than 46,000 decisions.[7] During the past fifty-seven years, millions of workers have taken advantage of the NLRA right to influence their wages, hours, and employment conditions through the collective bargaining process. Millions of collective agreements have been negotiated—most without resort to work interruptions, despite the fact that the duty to bargain does not compel either party to agree to any proposal or require the making of any concession.[8]

Empirical evidence suggests that workers who have selected bargaining agents have enhanced their individual economic benefits.[9] Their wage rates have been improved, and they have obtained health care coverage, pension programs, supplemental unemployment benefits, day care centers, and other important fringe benefits. Similar studies indicate that unorganized personnel have received indirect financial gain from the labor movement, since their employers have provided benefit packages competitive with those enjoyed by unionized employees.[10] If these business firms did not fear the possible unionization of their own employees, many would not be so concerned about their employment terms.

Excessive emphasis should not be placed solely upon the economic gains achieved by labor organizations. Through the "collective voice" exerted

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4. *Id.*
5. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
6. NLRB., NLRB: THE FIRST 50 YEARS vi (1985).
7. *Id.*
8. Section 8(d), 29 U.S.C. § 158(d) (1988), provides in relevant part:
   > For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession ....

   Id. An employer that fails to satisfy its duty to bargain in good faith contravenes Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1988), while a labor organization that fails to bargain in good faith violates Section 8(b)(3), 29 U.S.C. § 158(b)(3) (1988).
9. *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 43–77 (1984), and studies cited therein.
10. *See id.* at 151–53.

by organized groups, workers have advanced important non-economic interests.[11] Contractual provisions generally preclude discipline except for "just cause." This contrasts with the traditional "at will" doctrine, which permits employers to discharge workers for good cause, bad cause, or no cause at all.[12] Other clauses typically establish orderly layoff and recall procedures and require the application of relatively objective criteria to promotional opportunities.

When employees are not satisfied with the manner in which contractual terms are applied, they may invoke grievance-arbitration procedures. During grievance adjustment sessions, labor and management representatives are usually able to negotiate mutually acceptable solutions for their outstanding contractual disputes. If no such accords are achieved, the dissatisfied parties may ask neutral arbitrators to determine the controverted issues. Grievance-arbitration procedures prevent arbitrary employer action and provide workers with access to impartial determinations of controversies concerning the interpretation and application of bargaining agreement terms. Without the rights and protections created by the NLRA, such orderly grievance adjustment systems would not exist as pervasively as they do today.[13]

During the first several decades of the NLRA, Labor Board and court decisions judiciously protected the Section 7 right of employees to form, join, and assist labor organizations and to select exclusive bargaining agents.[14] Individuals with tenuous employment relationships who appeared to need collective strength to counterbalance corporate power were provided with NLRA coverage. Worker participation in management decision-making through the bargaining process was inexorably expanded to include most relevant subjects. Remedial orders were devised to rectify the effects of unfair labor practice violations. As a result, union membership expanded rapidly.

When the NLRA was enacted in 1935, labor organizations had 3,584,000 members, which represented 13.2% of nonagricultural work force participants.[15] By 1940, union membership grew to 8,717,000, comprising 26.9% of nonagricultural workers.[16] At the conclusion of World War II, labor organizations had 14,322,000 members, representing 35.5% of the nonagricultural work

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11. *See id.* at 94–110.

12. *See generally* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

13. Although some unorganized employers have unilaterally adopted internal grievance procedures that may be invoked by employees dissatisfied with certain management decisions, many of these programs would not have been established if these employers had not feared the possibility of labor organizing drives.

14. Section 7, 29 U.S.C. § 157 (1988), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.

15. *See* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 (tbl. 1) (1987).

16. *Id.*

force. By 1954, union membership exceeded 17,000,000 and still constituted approximately 35% of nonagricultural work force participants.[17] Labor organizations prevailed in 70–86% of representation elections conducted by the Labor Board during the 1940s and 61–75% of the elections held during the 1950s.[18] By the late 1950s, the American labor movement had become a powerful economic and political institution.

As the NLRA became a more established institution, however, several trends emerged. Employer groups lobbied in favor of legislative amendments designed to curtail employee rights and union influence. Labor Board and court decisions began to erode important statutory protections. Union membership began to decline, with the proportion of nonagricultural workers in unions decreasing steadily from 35% in 1954 to 27.3% in 1970 and to 23.6% in 1978.[19] During 1980, unions won only 50% of Labor Board representation elections.[20]

The erosion of union membership continued throughout the 1980s. By 1990, there were 16,740,000 union members, representing a mere 16.1% of nonagricultural workers.[21] During the first six months of 1990, labor organizations prevailed in only 47.5% of NLRB representation elections.[22] Had it not been for the significant growth of public sector labor organizations over the past three decades, the diminution in union membership would have been even more pronounced. By 1990, only 10,260,000 private sector employees were members of labor unions, comprising a meager 12.1% of nonagricultural private sector workers.[23] If this downward trend continues, American labor organizations may represent a mere 5% of private sector personnel by the year 2000.[24] The demise of a viable labor movement would seriously undermine industrial democracy by depriving rank-and-file employees of the opportunity to participate in the management decision-making process.

Business firms depend upon the input of three fundamental groups: investors, managers, and workers. As each of these groups competes for a greater share of company profits and for a more significant degree of control over corporate decision-making, individual employees are at a distinct disadvantage. Companies seeking investment capital must provide prospective stock or bond holders with detailed information regarding the proposed venture.[25] Shareholders have the right to vote on significant corporate issues. When investors become disenchanted with the performance of particular corporations, they can simply sell their shares and invest elsewhere.

Professional managers may similarly protect their own interests. Those with relatively unique personal skills can frequently negotiate long-term contracts that may provide "golden parachutes" in case the business relationship

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17. *Id.*
18. *See id.* at 90 (tbl. 11).
19. *See id.* at 10 (tbl. 1).
20. *See id.* at 23 Figure 4.
21. *See* Daily Lab. Rep. (BNA) No. 26, at B–8 (Feb. 7, 1991).
22. Daily Lab. Rep. (BNA) No. 217, at A–1 (Nov. 8, 1990).
23. *See* Daily Lab. Rep. (BNA) No. 26, at B–10 (tbl. 2) (Feb. 7, 1991).
24. Daily Lab. Rep. (BNA) No. 241, at A–1 (Dec. 18, 1989).
25. *See* Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1062 (1984).

is terminated prematurely. High level executives are generally acquainted with their counterparts at other business entities, and they can use those contacts to locate other employment opportunities if they decide to leave their current firms.

Rank-and-file employees do not enjoy such privileges. They are fortunate to have one or two job opportunities at any one time. Employers feel no need to give job applicants detailed information regarding firm affairs. Once they accept employment with a specific company, workers enjoy minimal mobility. They possess limited information about other job openings, and the transaction costs associated with relocation may be substantial. To change jobs, they may lose some or all of their pension rights. They must also forfeit accrued seniority and start at the bottom of the list in their new environment, significantly jeopardizing their future employment security.

It is ironic that the individuals who possess the least mobility normally exercise only marginal control over their employment destiny. Unorganized workers are generally powerless to negotiate with their corporate employers over their wages, hours, and working conditions. They must accept the terms unilaterally offered or look for alternative employment. If they are directed to submit to drug testing or to engage in particularly arduous tasks, they have no real choice but to comply. This loss of personal freedom results directly from the considerable inequality of bargaining power that exists between the individual employee and corporate managers.

The labor movement was created to provide individual workers with a collective voice that could effectively counter the aggregate power of corporate entities. Without organizational strength, there is no broad-based institution to represent the interests of rank-and-file employees.[26] If labor organizations become wholly ineffective institutions, many employers will undoubtedly exploit their employees by retaining an excessive portion of profits, by creating less beneficial working conditions, and by subjecting lower level personnel to more arbitrary treatment.

The NLRA was established to enhance worker dignity through industrial democracy. Collective bargaining was expected to provide individual employees with a vehicle to counterbalance the overwhelming power advantage enjoyed by their corporate employers.[27] Through organizational strength, employees would be able to influence their terms and conditions of employment and to share in the governance of the businesses for which they toiled. To the extent that individuals are permitted to influence employment conditions and business decisions that directly affect their economic future, they are more likely to develop a personal commitment to the enterprise. They are more inclined to be comfortable with the final determinations made, and to be more cooperative and productive workers.

Statutory amendments and Labor Board and court decisions have significantly decreased the ability of labor unions to organize new employees and to

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26. *See* THOMAS B. EDSALL, THE NEW POLITICS OF INEQUALITY 177 (1984); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 4 (1988).

27. *See* Steven L. Wilborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C. L. REV. 725, 726–27 (1984).

exert meaningful economic pressure on behalf of those workers who have selected bargaining agents. This Article will initially explore the early expansion of employee rights under the NLRA. It will then examine the legislative and judicial actions that have eroded fundamental NLRA protections. It will finally propose changes that must be made in the NLRA if the labor movement is to regain its vitality and industrial democracy is to be preserved.

II. THE EARLY EXPANSION OF STATUTORY RIGHTS AND PROTECTIONS

Following the enactment of the NLRA, the Labor Board and courts extended statutory coverage to diverse groups of workers. In *NLRB v. Hearst Publications, Inc.*,[28] the Supreme Court upheld the extension of collective bargaining rights to newspaper sellers who would have been considered "independent contractors" under traditional legal principles, and in *Packard Motor Car Co. v. NLRB*,[29] the Court sustained the authority of the Labor Board to provide statutory coverage for lower level supervisors. In *Hearst Publications*, the Court adopted the "economic realities" test to determine which individuals really needed organizational strength to counterbalance the economic power possessed by those for whom they worked.

> Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them .... Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically "independent contractors" and their employers as from disputes between persons who, for those purposes, are "employees" and their employers. Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as "helpless in dealing with an employer," as "dependent ... on his daily wage" and as "unable to leave the employ and to resist arbitrary and unfair treatment" as the latter.[30]

The Supreme Court concluded in these cases that seemingly independent newspaper sellers and lower level supervisors should be treated as "employees" under the NLRA.

During the formative years of the NLRA, basic substantive rights were promptly defined and enforced. Overt forms of intimidation were substantially reduced,[31] as coercive threats and discriminatory treatment[32] were statutorily

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28. 322 U.S. 111 (1944).
29. 330 U.S. 485 (1947).
30. 322 U.S. at 127–28 (citations omitted).
31. Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1988), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 ...."
32. Under Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1988), it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," except where membership is required pursuant to a lawful union security provision.

proscribed. Employer-dominated employee committees were quickly challenged under Section 8(a)(2),[33] with "company unions" being disestablished under Labor Board directives.[34] The NLRB and the courts developed legal doctrines designed to protect the unfettered choice of employees to unionize. The Labor Board determined that conduct not constituting an unfair labor practice provided the basis for setting aside election results, where the challenged action may have prevented a fair representation election.[35] Under the *Hollywood Ceramics*[36] doctrine, elections were nullified when material misrepresentations of fact emanated from parties in positions to know the correct facts and the opposing party did not have sufficient time to correct the misstatements before the balloting.

As the NLRA matured, more subtle forms of employer restraint were prohibited. For example, pre-election benefit increases that would likely induce workers to vote against representation were proscribed, even when there was no direct evidence that the employer intended to impermissibly influence the election process.[37] Companies were similarly prohibited from discharging union supporters for misconduct that allegedly occurred during organizing campaigns, where no unprotected behavior actually took place. Because the alleged misconduct was inextricably intertwined with the privileged organizing activities, it was thought that such erroneous terminations would have a chilling effect upon the exercise of protected organizing rights.[38]

When employers rejected union requests for voluntary recognition based upon claims of majority support and employers thereafter engaged in unfair labor practices designed to dilute the majority support that had been obtained by the organizing unions, remedial bargaining orders directing the offending employers to recognize and bargain with the adversely affected labor organizations were generally issued.[39] The Supreme Court subsequently intimated that where "outrageous" and "pervasive" employer unfair labor practices had significantly deterred employee organizing efforts, the NLRB might issue remedial bargaining orders even in the absence of demonstrations that the organizing labor entities had ever achieved majority support.[40] This exceptional rule was premised upon the belief that these labor organizations would have attained majority strength but for the chilling effect of the extreme employer conduct. Because the need for an efficacious deterrent to flagrant

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33. 29 U.S.C. § 158(a)(2) (1988) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ...."

34. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 197–98 (1976).

35. *See, e.g.*, Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786–87 (1962). Although Section 8(c), 29 U.S.C. § 158(c) (1988), provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, ... shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit," the Labor Board recognized in cases like *Dal-Tex Optical* that this provision is only applicable to unfair labor practice proceedings and does not govern representation cases.

36. Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962).

37. NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

38. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22–24 (1964).

39. *See, e.g.*, Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264–65 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950); Snow & Sons, 134 N.L.R.B. 709, 710–11 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

40. NLRB v. Gissel Packing Co., 395 U.S. 575, 613–14 (1969).

employer unfair labor practices had to be balanced against the right of employees to be free from representation by non-majority unions,[41] bargaining orders were issued in favor of minority unions only in cases involving extraordinary circumstances.[42]

The Labor Board and the courts also expanded the definition of protected "concerted activity" to enhance the statutory rights of employees. For example, coverage was extended to include individual conduct that was found to advance the employment interests of other employees. Under the "constructive concerted activity" doctrine, an individual employee asserting a right contained in a collective contract would automatically be considered to be acting on behalf of the other workers covered by that agreement.[43] In *Alleluia Cushion Co.*,[44] the Labor Board ruled that an individual's complaint under a safety and health statute constituted "concerted" activity, even when there was no bargaining agreement and no evidence of support from coworkers.[45]

In *NLRB v. J. Weingarten, Inc.*,[46] the Supreme Court sustained the extension of Section 7 protection to employees requesting union representation during employer-initiated investigatory interviews the workers reasonably fear might result in disciplinary action. Whenever individual employees are called in for investigatory interviews they believe may culminate in discipline, they may lawfully insist upon the presence of shop stewards before any questioning may occur. The Labor Board subsequently extended the right to coworker assistance at such investigatory interviews to persons employed in nonunion settings.[47]

Even though Section 10(c) of the NLRA, as amended by the Labor-Management Relations Act, provides that the Labor Board shall not order the reinstatement of any employee who has been terminated for cause,[48] the NLRB appropriately recognized that this rule should not preclude reinstatement orders in all cases of worker misconduct. When significant employer unfair labor practices provoked acts of unprotected misbehavior by employees, the Board balanced the seriousness of the protester misconduct against the seriousness of the employer violations. If the antecedent employer

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41. *Cf.* International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737–40 (1961) (voluntary extension of representation status to minority union per se unfair labor practice regardless of good or bad faith of employer and labor organization).

42. *See, e.g.*, Conair Corp., 261 N.L.R.B. 1189, 1192–93 (1982). The D.C. Circuit Court refused to enforce this portion of the Board's remedial order, since it concluded that any departure from the principle of majority rule should be left to Congress. Conair Corp. v. NLRB, 721 F.2d 1355, 1377–84 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984).

43. *See* Interboro Contractors, 157 N.L.R.B. 1295, 1298–99 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). This doctrine was sustained by the Supreme Court in NLRB v. City Disposal Systems, 465 U.S. 822 (1984).

44. 221 N.L.R.B. 999, 1000–01 (1975).

45. *Id.*

46. 420 U.S. 251, 260–64 (1975).

47. *See* Materials Research Corp., 262 N.L.R.B. 1010, 1013–15 (1982).

48. 29 U.S.C. § 160(c) (1988) authorizes the Labor Board to order an unfair labor practice violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the NLRA]," but it further provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged ... for cause."

unfair labor practices were far more serious than the unprotected employee responses, reinstatement was directed.[49]

Section 8(d) expressly grants employees who select an exclusive bargaining agent the right to negotiate over "wages, hours, and other terms and conditions of employment ...."[50] Although the NLRA does not define mandatory bargaining topics, administrative and judicial decisions recognized the prerogative of representative labor organizations to demand discussions regarding such fringe benefits as vacations,[51] pension plans,[52] group insurance programs,[53], and paid sick leave provisions.[54] Many other obligatory subjects were similarly determined, covering such areas as employee discounts,[55] safety rules,[56] employee workloads,[57] grievance procedures,[58] layoff and recall rights,[59] and certain subcontracting decisions.[60] By the late 1960s, labor organizations expected negotiating with respect to most topics that had any meaningful impact upon worker interests.[61]

The Supreme Court acknowledged the need for representative unions to maintain bargaining unit solidarity during labor disputes. In *NLRB v. Allis–Chalmers Manufacturing Co.*,[62] the Court sustained the right of labor organizations to impose judicially-enforceable fines upon members who cross picket lines to work during lawful work stoppages. The *Allis–Chalmers* Court reviewed the legislative history of the LMRA amendments to the NLRA and concluded that Congress did not intend the Section 8(b)(1)(A)[63] proscription

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49. *See, e.g.*, Kohler Co., 148 N.L.R.B. 1434, 1444–49 (1964), *aff'd*, 345 F.2d 748 (D.C. Cir. 1965), *and cert. denied*, 382 U.S. 836 (1965).

50. 29 U.S.C. § 158(d) (1988); *see supra* note 8.

51. *See* Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360 (1952).

52. *See* Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

53. *See* W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949).

54. *See* Singer Mfg. Co., 24 N.L.R.B. 444, 470–71 (1940), *enforced*, 119 F.2d 131 (7th Cir.), *and cert. denied*, 313 U.S. 595 (1941) (paid holidays, vacations, bonuses).

55. *See* Central Ill. Pub. Serv. Co., 139 N.L.R.B. 1407, 1415 (1962), *enforced*, 324 F.2d 916 (7th Cir. 1963).

56. *See* NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967).

57. *See* Beacon Piece Dyeing & Finishing Co., 121 N.L.R.B. 953 (1958).

58. *See* NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941).

59. *See* United States Gypsum Co., 94 N.L.R.B. 112, *amended*, 97 N.L.R.B. 889 (1951), *and modified on other grounds*, 206 F.2d 410 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

60. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209–15 (1964).

61. "Although there are still some subjects which are still considered voluntary or permissive, the mandatory classification has been expanded to include almost every conceivable activity, exceptional as well as routine, which even minutely affects wages, hours, and other terms and conditions of employment." Julian Clark Martin, Comment, *Subjects Included Within Management's Duty to Bargain Collectively*, 26 LA. L. REV. 630, 634 (1966).

62. 388 U.S. 175 (1967).

63. 29 U.S.C. § 158(b)(1)(A) (1988) provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein ... .

against union restraint and coercion to preclude the enforcement of internal union disciplinary rules against strike-breaking members.[64]

> Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion [of] its status ... through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strike breakers is essential if the union is to be an effective bargaining agent ...."[65]

In *NLRB v. Boeing Co.*,[66] the Supreme Court held that the magnitude of the penalties imposed by labor organizations upon members who violate legitimate union rules does not affect the propriety of such actions under the NLRA. Even though a truly excessive fine would certainly be more coercive than a reasonable assessment, the Court believed that Congress did not authorize the Labor Board to regulate such internal union matters. The NLRB employed similar logic to find that it does not possess the power under the NLRA to evaluate the fairness of the internal union procedures through which a fine is imposed.[67] By the early 1970s, it was clear that the Labor Board and the courts would not interfere with the right of labor organizations to impose discipline upon members who violated legitimate union rules.

Representative labor organizations were also provided with significant discretion regarding the expenditure of dues money collected from employees pursuant to lawful union security arrangements. The Supreme Court held in *Railway Employees Department v. Hanson*[68] and *International Association of Machinists v. Street*[69] that unions provided with exclusive bargaining rights under federal enactments could not constitutionally expend the compelled dues money of objecting bargaining unit members for political or ideological causes, but the scope of these holdings was quite limited. Labor entities continued to use these financial resources to support most other institutional endeavors.

The early Labor Board and court decisions provided workers and representative unions with expansive statutory rights and protections. Unions conducted many successful organizing campaigns and millions of employees exercised their right to bargain about managerial decisions that significantly affected their terms of employment. Individual employee conduct designed to advance the rights of other workers was accorded statutory protection. This trend was entirely consistent with the legislative purpose underlying the NLRA.

III. THE EROSION OF NLRA PROTECTIONS

The NLRA was enacted during the depths of the Great Depression. Even though the Supreme Court had recently invalidated the National

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64. *See* 388 U.S. at 178–95.

65. 388 U.S. at 181 (quoting Clyde W. Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951) (citations omitted)).

66. 412 U.S. 67, 71–78 (1973).

67. *See* Union of Elec. Workers, Local 1012, 187 N.L.R.B. 375 (1970).

68. 351 U.S. 225, 231–38 (1956).

69. 367 U.S. 740, 750–70 (1960).

Industrial Recovery Act[70] extension of bargaining rights to workers,[71] the Court finally acknowledged the need for special legislation to help bring the country out of the depression. By the latter part of the 1930s, the Court began to sustain the constitutionality of various enactments that advanced the rights of working people.[72] Nonetheless, the Supreme Court remained a conservative institution that did not believe that rank-and-file employees should be permitted to exert undue influence against their respective employers.

In *NLRB v. Mackay Radio & Telegraph Co.*,[73] the Court limited the primary economic weapon available to employees. Although the *Mackay Radio* case directly concerned the propriety of an employer's refusal to reinstate with other returning strikers several individuals who had been particularly active union supporters, the Court addressed an issue that had not been raised by the parties:

> Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for them.[74]

The Court effectively decided that the employer's need to continue operations during an economic strike outweighed the rather slight impact upon the striking employees. It is difficult to imagine a more devastating infringement on the statutorily protected right to engage in concerted activity than the loss of one's employment.

Even though *Mackay Radio* authorized employers to hire permanent replacements for striking employees, the Supreme Court was not willing to allow employers to use any device to negate the efficacy of a lawful work stoppage. Economic strikers could not be terminated, because they were engaged in protected concerted activity.[75] Even if lawfully replaced, the strikers retained their "employee" status under the NLRA and enjoyed preferential recall rights as soon as positions for which they were qualified became vacant.[76] Nonetheless, in 1959, Congress amended Section 9(c)(3) of the NLRA[77] to provide that permanently replaced economic strikers may only vote in representation elections conducted within twelve months from the date

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70. Pub. L. No. 67, 48 Stat. 195 (1933).

71. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

72. The constitutionality of the NLRA was sustained in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *See also* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (sustaining the sections of the Social Security Act that encouraged states to adopt unemployment compensation programs), and Helvering v. Davis, 301 U.S. 619 (1937) (sustaining the Social Security Act pension provisions).

73. 304 U.S. 333 (1938).

74. *Id.* at 345–46.

75. *See* NLRB v. International Van Lines, 409 U.S. 48, 52–53 (1972).

76. *See* Laidlaw Corp., 171 N.L.R.B. 1366, 1368–69 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *and cert. denied*, 397 U.S. 920 (1970).

77. 29 U.S.C. § 159(c)(3) (1988).

the strike commenced. This statutory change made it easier for a business firm that had broken a work stoppage to initiate decertification of the incumbent union one year after the strike began, since only the replacement personnel and reinstated strikers could vote in that election.

In the 1963 *Erie Resistor* case,[78] the Supreme Court held that an employer could not offer striker replacements twenty years of "super-seniority" that they could use in future years during layoffs to displace reinstated strikers with greater actual seniority. In *Giddings & Lewis, Inc. v. NLRB*,[79] the Seventh Circuit ignored the import of *Erie Resistor* when it held that an employer that had hired permanent replacements during an economic strike did not violate the NLRA when it promulgated a rule providing that members of the existing workforce would be recalled in order of their respective seniority, ahead of more senior, unreinstated strikers, in the event of a layoff.[80] This practice effectively provides replacement personnel with the same "super-seniority" the *Erie Resistor* Court found impermissible.

In *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*,[81] the Supreme Court established a new rule that further undermines worker solidarity during strikes. A closely divided Court held that less senior "cross-over" employees who refused to honor the initial strike call or decided to return to work during the work stoppage could retain the higher positions they obtained while their more senior colleagues were on strike after the labor dispute had been resolved. This doctrine encourages less senior personnel to work during strikes in an effort to obtain an employment advantage vis-a-vis more senior employees who choose to strike, and it causes more senior workers to fear that their participation in lawful work stoppages may jeopardize the job security they previously earned.

When businesses were unable to obtain additional court decisions narrowing the economic weapons available to employees, they petitioned Congress for relief. Under the original NLRA, representative labor organizations were allowed to utilize secondary tactics to further worker interests. For example, if a union had a labor dispute with Employer A, it could lawfully picket Employer B, a supplier or customer of Employer A that was not directly involved in the labor discord, in an effort to exert pressure on primary Employer A. This device enabled unions to expand controversies to other parties and to enhance their collective leverage.

The 1947 Labor-Management Relations Act (LMRA)[82] amended the NLRA to prohibit most forms of secondary activity. In new Section 10(l),[83] the Labor Board was directed to seek immediate injunctive relief against labor organizations employing secondary tactics during the pendency of the NLRB unfair labor practice proceedings. The LMRA also provided adversely affected primary and secondary employers with the right to seek monetary

78. NLRB v. Erie Resistor Corp., 373 U.S. 221, 227–31 (1963).
79. 675 F.2d 926, 930–31 (7th Cir. 1982).
80. The *Giddings & Lewis* approach continues to be followed today. *See* Aqua-Chem, Inc. v. NLRB, 910 F.2d 1487, 1489–90 (7th Cir. 1990), *reh'g denied*, 922 F.2d 403 (7th Cir.), *and cert. denied*, 111 S. Ct. 2871 (1991).
81. 489 U.S. 426, 432–43 (1989).
82. Pub. L. No. 101, 61 Stat. 136 (1947).
83. 29 U.S.C. § 160(l) (1988).

damages in federal court.[84] With the passage of the 1959 Labor–Management Reporting and Disclosure Act amendments,[85] Congress expanded the area of proscribed secondary activity.[86] It outlawed peacefully obtained "hot cargo" agreements in which a union agreed with a secondary employer that it would not do business with a primary employer involved in a labor dispute.[87] In addition, the 1959 amendments imposed severe restrictions on peaceful picketing designed to organize employees or to obtain voluntary recognition.[88] This action made it more difficult for labor entities to unionize new workers.

Not only did employers work from the beginning to limit the economic weapons available to employees, but they also sought to restrict the number of individuals subject to NLRA coverage. Businesses were particularly concerned about the *Hearst Publications* decision extending bargaining rights to independent newspaper salespersons and the *Packard Motor Car* holding that enabled lower level supervisors to obtain union representation. In 1947, they induced Congress to amend the NLRA definition of "employee" to exclude both "independent contractors" and "supervisors."[89] Congress thus rejected the "economic realities" test to determine those individuals most in need of NLRA protection.

The Supreme Court further narrowed the statutory definition of "employee" in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*[90] The Court had to decide whether individuals who had been employed by

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84. *See* Section 303 of the LMRA, 29 U.S.C. § 187(b) (1988).

85. Pub. L. No. 86–257, 73 Stat. 519 (1959).

86. Under Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1988), it is an unfair labor practice for a labor organization or its agents—

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—(A) forcing or requiring any employer or selfemployed person to join any labor or employer organization or to enter into any agreement which is prohibited by [Section 8(e)]; (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees ....

87. Section 8(e), 29 U.S.C. § 158(e) (1988), provides that "[i]t shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person ...."

88. Section 8(b)(7), 29 U.S.C. § 158(b)(7) (1988), prohibits organizational or recognitional picketing "(A) where the employer has lawfully recognized ... any other labor organization and a question concerning representation may not appropriately be raised under [Section 9(c)], (B) where within the preceding twelve months a valid election ... has been conducted, or (C) where such picketing has been conducted without a [representation election] petition ... being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing."

89. 61 Stat. 136 (1947), codified at 29 U.S.C. § 152(3) (1988). *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1959), at 304–08.

90. 404 U.S. 157, 163–82 (1971).

a company long enough to earn pension benefits continued to enjoy "employee" status following their retirement—at least to the extent they wished to bargain over their pension rights. Since such persons were no longer actively seeking reemployment with their former employer, the Court ruled that they should not be considered "employees" under the NLRA. If the *Pittsburgh Plate Glass* Court had relied upon the *Hearst Publications* "economic realities" test, it might well have concluded that such retirees were in need of the collective strength Congress envisioned when it enacted the NLRA, and it might have provided them with the limited statutory protection they sought.

Through the 1980 *Yeshiva University* decision,[91] the Supreme Court substantially reduced the NLRA protection available to white-collar personnel. The case involved the right of university professors to organize for collective bargaining purposes. The *Yeshiva University* majority initially noted that "managerial" employees, who "formulate and effectuate management policies by expressing and making operative the decisions of their employer,"[92] have historically been excluded from NLRA coverage by Labor Board decisions due to their close alignment with corporate management. They then found that university professors exercise the types of managerial discretion that warranted their exclusion:

> [T]he faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion, their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[93]

The *Yeshiva University* Court ignored the absence of meaningful faculty control over their "wages, hours, and other terms and conditions of employment."[94] It instead focused on the faculty input with respect to ancillary matters that did not directly and significantly affect their fundamental terms of employment. Unfortunately, the Court overlooked a crucial consideration. The very fact that faculty members at Yeshiva University perceived the need to organize belied the notion that they effectively operated the institution from a labor relations or personnel perspective.

In *College of Osteopathic Medicine & Surgery*,[95] the Labor Board extended the *Yeshiva University* reasoning. It ruled that organized college faculty members who obtain meaningful control over academic matters

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91. NLRB v. Yeshiva University, 444 U.S. 672 (1980).
92. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974).
93. 444 U.S. at 686.
94. Section 8(d), 29 U.S.C. § 158(d) (1988).
95. 265 N.L.R.B. 295, 296–97 (1982).

through the collective bargaining process become "managerial" personnel and forfeit their negotiation rights under the NLRA. The *College of Osteopathic Medicine & Surgery* decision makes it clear that professional workers who unionize must confine their negotiations to matters that do not meaningfully affect entrepreneurial control. If they expand their demands to include managerial issues, they will lose their "employee" status.

The *Yeshiva University* and *College of Osteopathic Medicine* decisions make it increasingly difficult for labor unions to organize the rapidly expanding white-collar segment of the United States economy. White-collar personnel have traditionally exercised a significant degree of influence over the manner and means of their work. The *Yeshiva University* doctrine characterizes such individuals as "managerial" personnel who are excluded from NLRA coverage.

Over the past two decades, the Labor Board and the courts have made it easier for corporations to prevent unionization. Under the traditional *Hollywood Ceramics Company, Inc.*,[96] approach, the NLRB had refused to permit material misrepresentations to adversely affect the manner in which employees voted in representation elections. Following the publication of a limited empirical study[97] that naively suggested that employee voting was not meaningfully influenced by employer misrepresentations or threats,[98] the Labor Board abandoned the *Hollywood Ceramics* doctrine. In *Shopping Kart Food Market*,[99] the NLRB announced that it would no longer set aside election results based upon misleading campaign statements. The Board noted that election rules "must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."[100] The Board no longer evaluates the impact of misleading campaign statements upon worker free choice. It simply assumes that individuals whose employment destiny is substantially controlled by their employer are not influenced by employer campaign recitations suggesting that unionization may cause a loss of business and jobs.[101] It is difficult to believe that individuals can wholly ignore deliberate misrepresentations designed to induce them to believe that a vote in favor of union representation may cause the loss of their employment. Furthermore, the fact that companies continue to use these tactics demonstrates that they consider them effective.

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96. 140 N.L.R.B. at 221.

97. JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

98. *See* William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 567–75 (1983), wherein Professor Dickens reevaluated the data used by Professors Getman, Goldberg, and Herman and concluded that employer threats and anti-union campaign materials influence the outcome of representation elections more than Professors Getman, Goldberg, and Herman initially surmised.

99. 228 N.L.R.B. 1311, 1312–13 (1977).

100. *Id.* at 1313. In General Knit of California, Inc., 239 N.L.R.B. 619, 620–23 (1978), a new 3–2 Board majority overruled *Shopping Kart* and reinstated the *Hollywood Ceramics* test. Four years later, however, another 3–2 Board majority overruled *General Knit* and returned to the "sound rule" that had been enunciated in *Shopping Kart*. *See* Midland Nat'l Life Ins. Co., 263 NLRB 127, 131–32 (1982).

101. *See, e.g.*, Fiber-Lam, Inc., 301 N.L.R.B. No. 9, 136 L.R.R.M. 1147 (1991); Tri-Cast, Inc., 274 N.L.R.B. 377, 378 (1985).

Business firms willing to issue overt threats and to terminate key union supporters to discourage unionization are quite likely to avoid any bargaining obligation. Although the Supreme Court had indicated in *NLRB v. Gissel Packing Co.*[102] that a remedial bargaining order might be issued in favor of a non-majority labor organization when its organizing drive had been thwarted by outrageous employer unfair labor practices, the Labor Board recently ceased issuing bargaining directives in favor of non-majority unions.[103] Any labor entity seeking such an order must now demonstrate that it actually achieved majority support. An employer that acts quickly to thwart an incipient organizing campaign through unlawful threats and discharges may normally frighten the remaining workers sufficiently to prevent the campaigning union from attaining majority support. Even though such a company would incur some backpay liability, it would succeed in avoiding the duty to recognize and bargain with an outside labor union.

In *NLRB v. City Disposal Systems*,[104] the NLRB convinced the Supreme Court to sustain the propriety of the "constructive concerted activity" doctrine that had been recognized in *Interboro Contractors*[105] and to extend statutory protection to individual workers who complained about matters of presumed interest to fellow employees. In its contemporaneous *Meyers Industries*[106] decision, however, the Labor Board substantially restricted the scope of NLRA coverage available under the *Interboro Contractors* concept. It held that the NLRA no longer insulates individuals from employer retaliation when they question safety conditions or file complaints with state or federal regulatory agencies, unless they either act in direct concert with other workers or assert rights codified in existing bargaining agreements. "Taken by itself, ... *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action."[107] Unrepresented personnel who are not covered by a collective contract and who are not careful to associate themselves with other workers may no longer challenge resulting discharges under the NLRA.

After the Supreme Court held in *NLRB v. Weingarten, Inc.*[108] that organized employees could request the assistance of shop stewards at investigatory interviews they reasonably feared might result in discipline, the Labor Board appropriately extended this statutory protection to nonunion personnel in *Materials Research Corp.*[109] Nonetheless, in 1985 the NLRB overturned the *Materials Research* holding, and denied unorganized employees the right to request representation at investigatory interviews.[110] The Labor Board ignored the fact that Section 7 says nothing to suggest that protected concerted activities are to be defined differently for union and nonunion personnel. It merely

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102. 395 U.S. 575, 613–14 (1969).
103. *See* Gourmet Foods, Inc., 270 N.L.R.B. 578, 583–87 (1984).
104. 465 U.S. 822, 829–39 (1984).
105. 157 NLRB 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). This doctrine was sustained by the Supreme Court in NLRB v. City Disposal Systems, 465 U.S. 822, 829–39 (1984).
106. 268 N.L.R.B. 493 (1984).
107. 268 N.L.R.B. at 498.
108. 420 U.S. 251, 256–68 (1974).
109. 262 N.L.R.B. 1010, 1012–15 (1982).
110. *See* Sears, Roebuck & Co., 274 N.L.R.B. 230 (1985).

guarantees employees the right "to engage in ... concerted activities, for the purpose of collective bargaining *or* other mutual aid or protection."[111] While the right to engage in collective bargaining necessarily involves organized employees, there is nothing in the language of Section 7 to indicate that unorganized personnel do not enjoy the same rights as unionized workers with respect to concerted action for mutual aid and protection. Surely a fellow employee in a nonunion environment can provide the kind of assistance that a shop steward would provide in an organized setting. One might reasonably suggest that the nonunion employee needs such protection more during an investigatory interview than a unionized person, because the union worker could challenge any resulting discipline through the contractual grievance-arbitration procedures.

Clear Pine Mouldings[112] further eroded the NLRA protection afforded to individual employees, because the Labor Board discarded the "provocation" doctrine that had been applied in cases like *Kohler Co.*[113] The provocation doctrine preserved the reinstatement rights of employees who engaged in nonflagrant misconduct in response to serious antecedent employer unfair labor practices. The *Clear Pine Mouldings* Board declared that workers adversely affected by truly outrageous NLRA violations must seek administrative redress instead of resorting to unprotected self-help measures, even if it takes two or three years to obtain final relief through those procedures.[114] Under this new theory, strikers who protest extreme employer unfair labor practices forfeit their right to reinstatement if they are induced to engage in overly exuberant behavior. Such an inflexible rule undermines important policies embodied in the NLRA:

> [W]here an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act. Those policies inevitably come into conflict when both labor and management are at fault. To hold that employee "misconduct" automatically precludes compulsory reinstatement ignores two considerations which we think important. First, the employer's antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action. Second, reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union.[115]

When the doctrine enunciated in *Clear Pine Mouldings* is combined with the remedial rule established in *Gourmet Foods*, it becomes clear that employers willing to ignore their legal obligations under the NLRA can significantly disenfranchise employees endeavoring to exercise their protected right to organize. A particularly anti-union company can instruct its supervisory per-

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111. 29 U.S.C. § 157 (1988) (emphasis added).

112. 268 N.L.R.B. 1044, 1045–47 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

113. 148 N.L.R.B. 1434 (1964), *aff'd*, 345 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 836 (1965).

114. *See* 268 N.L.R.B. at 1045–47.

115. Local 833, UAW v. NLRB, 300 F.2d 699, 702–03 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

sonnel to alert it to incipient organizing efforts. It can readily ascertain the names of the primary union organizers and terminate them in a public and humiliating manner. If the employer is fortunate, its openly provocative method of termination may precipitate unprotected responses from the discriminatees causing them to forfeit their right to reinstatement under *Clear Pine Mouldings*. Such overtly intimidating conduct by the employer would likely discourage further organizing activity by the remaining workers, since it would probably take two or three years before a judicially enforced reinstatement order could benefit the union supporters who were illegally discharged. This would probably prevent the attainment of majority strength by the affected labor organization. The *Gourmet Foods* doctrine would thus preclude issuance of any remedial bargaining order. Even though such a pervasive unfair labor practice violator would undoubtedly incur sizable legal fees—and possibly some backpay liability—it might conclude that such costs are insignificant compared with the economic costs and loss of managerial freedom that might result from a unionized workforce.

Currently organized employees cannot influence their employment circumstances to the extent unionized workers could in the past. Recent Labor Board and court decisions have narrowed the scope of mandatory collective bargaining. The Supreme Court had recognized, in *Fibreboard Paper Products Corp. v. NLRB*,[116] that some economic considerations affecting managerial decisions should be subject to the bargaining process. This allowed employees to respond to employer concerns and permitted the negotiation of mutually acceptable accommodations that enhanced competing labor and management interests. In *First National Maintenance Corp. v. NLRB*,[117] the Supreme Court retreated from the expansive *Fibreboard* approach. While holding that a company decision to close part of a business does not constitute a mandatory subject for bargaining, the Supreme Court chose language that could potentially preclude employee participation in many important management decisions:

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice .... [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.[118]

Under the *First National Maintenance* approach, bargaining over management decisions having a significant impact upon employment security is only required when it appears likely that the representative labor organization can satisfy employer concerns at the bargaining table. The Supreme Court majority assumed that unions impede managerial freedom, and it decided to restrict the degree to which labor entities may interfere with business deci-

116. 379 U.S. 203, 209–15 (1964).
117. 452 U.S. 666 (1981).
118. *Id.* at 678–79.

sion-making. The Court failed to acknowledge that when Congress enacted the NLRA, it made the legislative determination that worker "interference" with managerial freedom was an appropriate consequence of a system that provided employees with meaningful input regarding their basic employment conditions.

In its recent *Dubuque Packing Co.*[119] decision, the Labor Board sought to harmonize the diverse tests enunciated by the Supreme Court in *Fibreboard* and *First National Maintenance.* It held that a business entity is only obliged to bargain about a prospective decision to relocate production from one facility to another when: (1) the management decision does not involve a change in the basic operation of the business; (2) the work to be performed at the new location will not be significantly different from that performed at the existing plant; (3) labor costs are a significant factor with respect to the company's proposed decision; (4) the representative union may be able to offer concessions that will satisfy the employer's financial concerns; and (5) there are no unusual circumstances present that require a prompt corporate decision that would be unduly delayed by collective negotiations pertaining to the proposed decision. These criteria continue to deprive labor organizations of the opportunity to bargain about many proposed management decisions that directly affect job security and/or employment conditions.

Although early Labor Board and court decisions provided labor organizations with substantial discretion over internal union discipline,[120] more recent holdings have eroded union disciplinary authority. For example, in *NLRB v. Textile Workers Granite State Joint Board,*[121] the Supreme Court held that a union could not lawfully discipline individuals who crossed a lawful picket line to return to work during a strike when they had lawfully resigned from the labor union prior to their strike-breaking activities. The fact that they had personally voted in favor of the work stoppage did not preclude them from resigning in the middle of the resulting job action.

Following the *Granite State Joint Board* decision, several labor organizations amended their constitutions to restrict the right of members to resign during on-going labor disputes. In *Machinists Local 1327,*[122] the Labor Board held that a rule prohibiting member resignations within fourteen days of or during a strike constituted an unreasonable restriction on the right of members to resign. Three Board members indicated, however, that a rule that would only permit member resignations to become effective thirty days following their submission might be acceptable. The Ninth Circuit refused to enforce the NLRB's order, because it found that the challenged resignation restriction reflected a legitimate union interest, impaired no policy embedded in the labor laws, and was reasonably enforced against union members.[123]

In *Pattern Makers' League of North America v. NLRB,*[124] the Supreme Court resolved the controversy. It initially held that the proviso to Section 8(b)(1)(A), which gives unions the right "to prescribe [their] own rules with

119. 303 N.L.R.B. No. 66, 137 L.R.R.M. 1185 (1991).
120. *See supra* notes 62–66 and accompanying text.
121. 409 U.S. 213, 215–18 (1972).
122. 263 N.L.R.B. 984, 987 (1982).
123. Machinists Local 1327 v. NLRB, 725 F.2d 1212, 1217–18 (9th Cir. 1984).
124. 473 U.S. 95, 104–12 (1985).

respect to the acquisition and retention of membership,"[125] did not indicate a congressional intention to permit labor organizations to restrict member resignations. Thereafter, the Court determined that the Section 7 right of employees to cross a picket line to work during a strike could not be limited by union provisions limiting membership withdrawals. The *Pattern Makers' League* decision undermines union solidarity during work stoppages by permitting employers to encourage employees to resign from membership and return to work.

Two contemporary Supreme Court decisions have limited the ability of representative labor organizations to use dues money received from employees under lawful union security arrangements to advance the interests of all workers. In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,[126] the Court held that while unions may expend the dues money received from objecting bargaining unit members to support conventions and social activities, since these endeavors contribute to worker solidarity and enhance collective bargaining interests, they may not use such resources to organize other groups of workers or to prosecute civil suits that do not directly involve the interests of members of the immediate bargaining unit. The Court simply ignored the fact that a union's capacity to organize the employees of competitor firms directly affects the job security and employment benefits enjoyed by organized personnel. It also disregarded the fact that test litigation prosecuted on behalf of one bargaining unit may directly benefit employees in other units. For example, a victory under the wage and hour laws or the civil rights acts could establish a precedent that would greatly advance the employment rights of all employees.

Lehnert v. Ferris Faculty Ass'n[127] further restricted labor organization use of funds received from objecting bargaining unit members. To constitute properly chargeable endeavors, the challenged activities must: (1) be "germane" to collective bargaining; (2) be justified by the government's vital interest in labor peace and avoiding "free riders" who benefit from representational efforts without paying for union services; and (3) not significantly add to the burdening of free speech inherent in the allowance of a union security agreement.[128] The *Lehnert* majority concluded that a labor organization could use compelled dues money to support: (1) a national publication that disseminated information relevant to collective bargaining, even though the challenged activities did not directly benefit persons in the dissenters' own bargaining unit; (2) information services concerning professional development, unemployment rights, and job opportunities; (3) participation by local union delegates in state and national union meetings at which bargaining strategies were developed; and (4) expenses incident to a strike.[129] The majority refused, however, to permit the expenditure of compelled dues money for lobbying, electoral, or other political activities. The *Lehnert* Court refused to acknowledge that a distinction might rationally be drawn between lobbying efforts designed to

125. 29 U.S.C. § 158(b)(1)(A) (1988).
126. 466 U.S. 435, 448–55 (1984).
127. 111 S. Ct. 1950, 1960–65 (1991). Even though the *Lehnert* case involved a public sector union, the parameters set forth in that decision will undoubtedly be applied to private sector labor organizations.
128. *Id.* at 1959.
129. *Id.* at 1963–65.

improve the employment conditions of workers and lobbying efforts that do not concern such issues.

IV. NEEDED LABOR LAW REFORMS

American political leaders frequently extol the importance of free trade unions in a democratic society. Even though they usually make such comments in connection with foreign countries, such as Poland and the former Soviet Union, their statements apply equally to the United States. Over the past several decades, business and government antipathy toward unions has combined with demographic, industrial, and global factors to threaten the continued viability of the American labor movement.[130] If this negative trend is not reversed in the near future, labor organizations will become relatively insignificant institutions by the beginning of the twenty-first century.

Union leaders will find it difficult to revitalize organized labor without the crucial assistance of Congress, the White House, and the judiciary. The NLRA must be amended to provide affirmative support for free trade unions. The United States must reconfirm the congressional objectives underlying the original Wagner Act if it seriously believes that vital labor organizations constitute an important component of a strong democracy. The rights of employees must be expanded, and new rules must be promulgated to protect employee free choice in representation elections. The economic options available to representative unions must be enhanced, the scope of bargaining must be broadened, and the remedial provisions of the NLRA must be modified to discourage illegal employer opposition to employee organization.

A. Substantive Changes

Congress must amend Section 2(3) of the NLRA,[131] which defines the term "employee," to reflect the economic realities characteristic of a post-industrial society. Although truly independent entrepreneurs should be viewed as "employers" and not "employees," the NLRA should cover individuals who perform services for businesses and might constitute "independent contractors" under archaic legal doctrines. Section 2(3) should be modified to incorporate the *Hearst Publications* "economic realities" test.[132] If the arrangement between a business firm and individual workers is analogous to a master-servant relationship, those workers should be regarded as protected "employees." This statutory change would be of significant benefit to cab drivers, truck drivers, free-lance workers and other persons who really function as "employees" of the corporations that retain their services.

Congress must also amend Section 2 to limit the scope of supervisory exclusion. Under Section 2(11),[133] the term "supervisor" includes:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

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130. *See generally* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633 (1983).

131. 29 U.S.C. § 152(3) (1988).

132. *See supra* notes 28–30 and accompanying text.

133. 29 U.S.C. § 152(11) (1982).

> discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Labor Board presently finds supervisory status in persons who possesses *the authority* to make such determinations, even when that authority is rarely exercised.[134] The statutory definition should be altered to exclude only those people who *regularly* and *actually* determine who is to be hired, disciplined, promoted, or rewarded, or who *regularly* and *actually* adjust employee grievances. Those lower level "supervisors" who exercise these powers infrequently or merely make recommendations to higher management officials who make the actual decisions should no longer be excluded from NLRA coverage. Their employment interests are more closely aligned with their rank-and-file colleagues than with corporate managers.[135] They should be allowed to advance their employment rights through collective bargaining.

Section 2 should finally be modified to limit the unreasonably expansive scope of the "managerial" exclusion the Supreme Court enunciated in *NLRB v. Yeshiva University*.[136] This doctrine is inconsistent with the concept of worker empowerment that is an inherent part of the NLRA because it denies these individuals the right to organize and bargain over their terms of employment.[137] Section 2(3) should explicitly exclude "managerial officials" and a new paragraph should be added that defines "managerial officials" to include only those persons "who regularly and meaningfully participate in the formulation or effectuation of fundamental labor or personnel policies directly pertaining to wages, hours, or other terms and conditions of employment." The mere fact that employees may influence company rules not directly related to such basic employment conditions should not warrant their exclusion from NLRA coverage.[138] These individuals lack the capacity to determine the issues that would be the subject of collective bargaining, and they should have the statutory right to advance their employment interests through organized efforts.

The statutory right of employees to organize is meaningless without the opportunity to participate in fair representation elections. Labor Board doctrines should prohibit tactics by employer or union agents likely to infringe employee free choice. While overt threats and retaliatory discharges have traditionally been proscribed, more subtle forms of intimidation have not

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134. *See, e.g.*, Yamada Transfer, 115 N.L.R.B. 1330 (1956); American Cable & Radio Corp., 121 N.L.R.B. 258 (1958).

135. *See* C. WRIGHT MILLS, WHITE COLLAR: THE AMERICAN MIDDLE CLASSES 87–91 (1951).

136. 444 U.S. 672, 682–83 (1980). *See supra* notes 91–93 and accompanying text.

137. *See* Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 1006–08 (1990). *See generally* David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989). *See also* David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990).

138. *Cf.* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 186–90 (1981), wherein the Supreme Court limited the Labor Board's "confidential" employee exclusion to those individuals who actually have access to confidential labor relations information. The Court refused to permit the exclusion to be applied to individuals who have access to other forms of confidential company information.

always been prohibited.[139] Employers should never be permitted to disseminate information that suggests that a vote in favor of unionization may endanger future bargaining unit job security. Individuals who are primarily dependent upon their employers for their continued economic existence are unlikely to ignore representations suggesting that their continued employment security is in jeopardy. Company representations regarding possible adverse effects of collectivization should always have to be based upon objective factual circumstances and be limited to assessments concerning demonstrably probable consequences that are beyond the control of the firm.[140]

Misrepresentations by persons in positions to know the facts should be similarly proscribed. The *Midland National Life Insurance Co.*[141] doctrine that permits the dissemination of pre-election misrepresentations is based upon the naive premise that employees are not meaningfully influenced by such factors. Employers would certainly not utilize these campaign techniques if they did not think they affected election outcomes. Business and labor entities engaged in electioneering should be barred from using deliberately deceptive tactics. Congress should amend the NLRA to codify the *Hollywood Ceramics*[142] standard. This legislative change would prevent representation election outcomes from being determined by the ability of campaign participants to distort the truth.

If workers are to vote intelligently in representation elections, they must become familiar with the arguments in favor of and opposed to unionization. Employers presently enjoy a distinct advantage in this regard. They may post rules preventing employee proselytizing during work time, but inform employees about the negative aspects of unionization during the same work time.[143] They are permitted to address their employees at captive audience sessions that workers must attend, to read anti-union statements over intercom systems, to post election propaganda on company bulletin boards, to include negative information about unionization in employee pay envelopes, and to mail campaign material to worker homes. Labor organizations are generally unable to employ such diverse forms of communication.[144]

Some observers have proposed that the communication imbalance be reduced by providing union organizers with limited access to company premises during election drives.[145] It is easy to understand why employer concern about theft, sabotage, and drug usage has caused most business entities to oppose any rule that would provide outside union agents with access to private company property. Nonetheless, there are less drastic means of lessening the significant communication advantage enjoyed by employers. During repre-

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139. *See, e.g.*, Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 131–32 (1982) (permitting employers to misrepresent material facts during organizing campaigns).

140. *See Gissel Packing Co.*, 395 U.S. at 618–19.

141. 263 N.L.R.B. at 127.

142. 140 N.L.R.B. 221 (1962). *See supra* note 36 and accompanying text.

143. *See* N.L.R.B. v. United Steelworkers, 357 U.S. 357, 358–65 (1958).

144. Once an election is directed, the petitioning labor organization is entitled to a list containing the names and addresses of the eligible voters. Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966). This enables unions to make home visits or to mail campaign information to worker homes.

145. *See* Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 45–51 (1988).

sentation campaigns, the NLRA should provide union organizers with access to appropriate bulletin boards, and it should permit them to have items placed in employee pay envelopes and in envelopes mailed to worker homes if those communication channels are utilized by the employers. When company officials give captive audience speeches in person or through public address systems, employees who support the union organizing drive should be statutorily provided with the equal opportunity to respond to the employer's anti-union message. If these various communication channels were made available to union supporters, it would greatly enhance the likelihood that employees would cast informed ballots in the subsequent Labor Board representation election.

To increase the probability of fair elections, Congress should amend Section 9[146] to mandate the holding of elections within two weeks after representation petitions have been filed. This would diminish the likelihood that improper conduct would interfere with employee free choice. NLRB notices could be immediately posted to apprise affected employees of their rights under the NLRA, and voter eligibility could be swiftly determined by Regional Offices. In most cases in which the employer contests the appropriateness of the bargaining unit proposed by the petitioning union, Regional Directors could decide the possible permutations and direct immediate elections. The votes of different employee groups could then be segregated until the unit question is resolved, and the Labor Board could then tally the votes of the relevant groups and certify the results.

Employers are generally aware of union organizing drives well before any election petition is filed. Supervisors inform managers of incipient campaign efforts, providing company officials with sufficient time to disseminate their anti-union message. If they had two weeks after the petition has been filed to continue their proselytizing, they would have enough time to address the pertinent issues. The use of expedited elections would not deprive workers of the information they need to make knowing choices, but it would reduce the chance for unscrupulous employers to benefit from unlawful tactics.

The statutory right of employees to organize for collective bargaining purposes is meaningless if workers lack the economic power to support their negotiating demands. Without some degree of meaningful empowerment, unionized personnel are forced to engage in collective begging, rather than collective bargaining. Several judicial decisions and statutory modifications have greatly diminished the economic weapons available to organized workers.

The Supreme Court decision in *NLRB v. Mackay Radio & Telegraph Co.*[147] represents an egregious example of judicial legislating. In the original NLRA, the right to strike was generally protected in Section 7 as the quintessential form of concerted activity for mutual aid and protection. Nonetheless, to be certain that this employee prerogative would not be subject to inappropriate Labor Board or court restraint, Congress specifically provided in Section 13 that "[n]othing in [the NLRA] ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike ...."[148] So

146. 29 U.S.C. § 159 (1988).
147. 304 U.S. at 333.
148. 29 U.S.C. § 163 (1988).

long as employees engaged in non-violent work stoppages designed to advance their bargaining objectives, they were provided with complete protection under the NLRA.

In *Mackay Radio*, a pro-business Supreme Court decided that Congress had provided workers with excessive economic freedom. If they could cause a loss of revenues through work stoppages, companies would be at a distinct disadvantage. To rectify this perceived imbalance, the Court held that workers do not have the right to compel struck entities to cease operations during labor disputes. To avoid this situation, the *Mackay Radio* Court ruled that struck employers possess the inherent right to hire permanent replacements for striking employees. The Justices implicitly recognized that the need of employers to continue operations outweighed the relatively slight impact on the striking workers. Even though the Supreme Court subsequently held that struck employers could not simply discharge individuals engaged in lawful work stoppages[149]—such persons could merely be "replaced"—it is clear that the *Mackay Radio* decision severely undermined the statutorily protected right of employees to strike.[150]

The *Mackay Radio* doctrine has been employed with greater frequency since President Reagan decided in 1981 to terminate 11,000 air traffic controllers who participated in an illegal strike against the federal government.[151] A recent AFL–CIO study found that approximately 11% of the 243,300 workers who participated in major strikes during 1990 were permanently replaced.[152] It is doubtful that the thousands of replaced strikers were comforted by the fact that they had been "permanently replaced," and not "discharged." Most were forced to seek other employment, and their representative labor organizations probably ceased to function as viable bargaining agents for the new personnel. Not only were the employers able to negate the statutorily protected right of their employees to engage in concerted activity, but they simultaneously were able to eliminate the bargaining representatives previously selected by their respective workers.

The *Mackay Radio* holding ignored two crucial propositions embodied in the NLRA—"that the law should protect the individual worker as the weaker party, and that the best protection against individual weakness [is] collective action."[153] By permitting employers to hire permanent replacements for striking employees, the Court effectively destroyed the economic balance that Congress sought to establish in the NLRA. It also diminished the capacity of workers to advance their employment interests through the collective bargaining process.[154]

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149. *See* NLRB v. International Van Lines, 409 U.S. 48, 52–53 (1972).

150. *See* Daniel Pollitt, Mackay Radio*: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 296–97 (1991).

151. *See generally* Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983); Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984).

152. Daily Lab. Rep. (BNA) No. 114, at A–3 (June 13, 1991).

153. Clyde Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFF. L. REV. 9, 10 (1982).

154. *See generally* Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547 (1990).

One could reasonably argue that struck employers should not be permitted to hire temporary *or* permanent replacements for striking employees, since the retention of such replacements would impermissibly interfere with the unfettered right of workers to resort to work stoppages. Nonetheless, such a complete prohibition against the employment of *any* replacement personnel would unduly prevent companies from protecting themselves against irrational union behavior. Workers could make wholly excessive demands and compel struck firms to capitulate or face economic ruin. Striking employees should not possess the unrestricted right to decide whether employers may continue to operate during their job actions. It is thus necessary to formulate a policy that would appropriately balance the interests of both struck employers and striking employees.

The proper balance could be accomplished in several ways. For example, the NLRA could be amended to bar the hiring of permanent *or* temporary replacements during the first one, two, or three months of an economic strike. Such an absolute prohibition would be similar to the Canandian Province of Quebec's statutory provision which totally prohibits the use of temporary or permanent replacement workers or subcontractor personnel to perform the work of striking personnel.[155] The affected employer could continue to function with regular management personnel, but it could not employ any replacement workers during the specified period. After the designated interval elapsed, however, the struck firm could employ temporary or permanent replacements. Because few work stoppages continue for more than one or two months, most companies would not be able to avail themselves of the right to hire any replacement personnel and the economic loss to struck businesses would usually be substantial.

The NLRA could be amended to prevent the hiring of *permanent* replacements during the first one, two, or three months of a work stoppage. Such an approach would be analogous to the provision in Ontario, Canada, that proscribes the employment of permanent replacements for six months following the commencement of a work stoppage.[156] While this type of restriction would preclude the displacement of striking employees during the initial period of a job action, it also would create major problems for business entities that could not attract temporary replacements due to special skill requirements or local labor market conditions.

A more reasonable alternative would involve the balancing approach frequently utilized to determine the degree to which employers may infringe protected employee rights due to business exigencies. Struck employers should be allowed to continue to operate through the hiring of *temporary* replacement workers who would have to be laid off as soon as the striking employees indicated their willingness to terminate their job actions. In the vast majority of situations, struck companies desiring to maintain operations would be able to locate a sufficient number of qualified temporary replacements to reduce the economic impact of work stoppages. Striking workers would realize that they could regain their positions and income at any time they were willing to end their work stoppage. Their long-term job security would be pre-

155. 1977 R.S.Q. ch. C-27, §§ 109.1–109.4.
156. 1980 R.S.Q. ch. 228 § 73.

served, and they still would be able to exert a meaningful degree of economic pressure against employers that were forced to function with temporary personnel.

Struck employers should only be permitted to hire *permanent* replacements in those rare instances in which they can demonstrate by clear and convincing evidence that local labor market conditions preclude the employment of qualified temporary workers. Doubts should be resolved in favor of striking employees by barring resort to permanent replacements except in extraordinary circumstances. To prevent the Labor Board or courts from permitting the premature hiring of permanent replacements, a statutory provision should totally proscribe the employment of permanent replacements during the first month or two of work stoppages.

A rule prohibiting the hiring of permanent replacements in most instances would prevent the vast majority of struck businesses from using employee job actions as an excuse to eliminate the jobs of those individuals with the temerity to engage in concerted activity. It would also restrict the ability of companies to use job actions as a means to decertify incumbent bargaining representatives through the employment of permanent replacement personnel. Moreover, it would deprive business firms countering union organizing campaigns of the ability to caution employees that if their selected bargaining agent decides to call a work stoppage, they can be permanently replaced.[157]

A statutory reversal of the *Mackay Radio* doctrine would also eliminate the negative impact of the decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*[158] in which the Supreme Court held that "cross-over" employees who refuse to strike with their fellow workers or who return to their employer during an on-going work stoppage may retain the positions they obtain ahead of more senior strikers whom they replace. Under the proposed NLRA amendment, once a strike concluded, the returning strikers could displace temporary replacements—including cross-over personnel—who are momentarily occupying their regular positions.

Some observers have argued that the *Mackay Radio* approach constitutes an appropriate accommodation of the competing interests of employers and employees. They suggest that workers who decide to walk out in an effort to increase their bargaining leverage must accept the risk that they may be permanently replaced.[159] They assume that the decision to engage in a work stoppage is solely within the control of the employees. They ignore the fact that employers can easily provoke concerted job action simply by taking a hard stand at the bargaining table. Rarely does an affirmative strike vote reflect only the actions of the bargaining unit personnel. It also tends to reflect the behavior of the employer involved.[160]

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157. *See* Pollitt, *supra* note 150, at 306–07.

158. 489 U.S. at 426. *See supra* note 81 and accompanying text.

159. *See, e.g.*, Brendan Dolan, Mackay Radio: *If It Isn't Broken, Don't Fix It*, 25 U.S.F. L. REV. 313, 316–17 (1991).

160. In 1991, several bills were introduced in Congress that would have reversed the *Mackay Radio* doctrine by either prohibiting the hiring of permanent replacement workers or by limiting the employment of such persons to circumstances in which temporary replacements could not be retained. The House of Representatives voted to adopt H.R. 5 that would have

The NLRA clearly was intended to provide individual employees with collective empowerment.[161] Congress realized that workers could not effectively counter the economic power of corporate entities without concerted action. Under the original NLRA, employees involved in a labor dispute could exert direct pressure against the target firm, and they could enlist the assistance of secondary parties. By inducing the employees of secondary employers to cease handling products going to or coming from the struck company, the primary workers increased their bargaining leverage. In 1947, business leaders convinced a conservative Congress to prohibit many forms of secondary behavior, and in 1959, most remaining forms of secondary action were proscribed.

At the present time, employees involved in a labor dispute against Employer A may only direct economic pressure toward that firm. If they induce the employees of secondary business entities to cease doing business with the struck company, or they threaten or coerce secondary parties in an effort to convince them to cease doing business with the primary party, they contravene Section 8(b)(4)(B).[162] They are subject to immediate injunctive relief under Section 10(l),[163] and are liable for damages under Section 303 of the Labor–Management Relations Act.[164] They can engage in consumer picketing at retail stores requesting customers not to purchase goods produced by the struck company[165]—so long as the struck goods do not constitute the principal items carried by the secondary retail establishment.[166] They may distribute handbills asking prospective customers to refrain from shopping at those shops if they continue to carry the struck goods during the existing labor dispute.[167] They may not, however, precipitate any cessation of work by individuals employed by secondary retail establishments. Such restrictions severely curtail the economic weapons available to unionized personnel.

Congress should acknowledge the fact that a significant imbalance in bargaining power has developed over the past two decades. Industrial and technological changes have diminished the efficacy of conventional work stoppages. The ability of struck business enterprises to hire temporary and permanent replacements has further eroded employee solidarity. The NLRA should be amended to permit limited forms of secondary activity. While labor unions should not be allowed to enmesh uninvolved secondary parties in disputes that are not directly relevant to them, they should be able to enlist the support of individuals working for secondary companies that have direct dealings with struck firms.

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barred the employment of permanent replacements. *See* Daily Lab. Rep. (BNA) No. 138, at A–11 (July 18, 1991). Senate supporters were unable to overcome business and White House opposition, and no change in the NLRA was enacted.

161. *See supra* notes 2–5 and accompanying text.

162. 29 U.S.C. § 158(b)(4)(B) (1988).

163. 29 U.S.C. § 160(l) (1988).

164. 29 U.S.C. § 187 (1988).

165. *See* NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 63–73 (1964).

166. *See* NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 611–15 (1980).

167. *See* Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

If a work stoppage is entirely successful, it shuts down the operations of the target company. As a result, that business suspends its purchases of raw materials and reduces its shipment of finished goods. The labor controversy affects the immediate suppliers and customers of the primary party. When striking employees cannot generate a complete cessation of primary operations, they should be permitted to expand their concerted activities to include the employees of those secondary companies that deal directly with the struck employer as suppliers or customers. They should be able to induce the workers of secondary firms to refuse to handle the raw materials destined for the struck firm or the finished goods coming from that establishment during the on-going controversy. If the primary business entity were to establish direct relationships with new suppliers or customers during a work stoppage, those companies should become subject to similar union pressure directed at their workers who handle goods going to or coming from the primary party.[168] Section 8(e)[169] of the NLRA should be similarly amended to permit primary employees and their union to ask secondary parties having direct relationships with the primary employer or its surrogate agents to enter into agreements in which those parties promise to cease doing business with the primary company during any lawful work stoppage against that firm.

Congress should expand the scope of consumer appeals that may be made by striking workers. If a struck firm is unable to operate during an industrial dispute, retail stores are unable to obtain the products normally manufactured by that company. It would thus be appropriate to amend Section 8(b)(4)(B) to permit striking individuals to appeal to customers of secondary retail stores. They should be able to use placards or handbills to request prospective customers to cease shopping at retail stores, so long as they continue to carry the products of the struck firm during the existing labor controversy. No distinction should be drawn between peaceful consumer picketing and peaceful consumer handbilling. Nor should the amount of revenue derived from sales of the struck goods affect the legality of such consumer appeals, because a complete shut down of the struck company would force the retail establishment to explore the availability of other products in any event.

If a secondary retail store is a direct customer of the primary employer or a contrived middle agent, the striking employees should be permitted to ask the retail workers to cease handling the primary party's goods. If there is no immediate relationship between the two entities, however, consumer picketing and handbilling should lose their statutory protection if the participants caused secondary retail employees to stop work. This limitation would apply to retail stores that carried primary products acquired from truly independent wholesale firms that did business with the struck company. The absence of direct dealings between the struck business and the retail establishment would prevent union appeals to the employees of the wholly secondary retail store.

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168. If an employer attempted to limit primary employee picketing of suppliers or customers by creating an artificial middle enterprise through which it funneled raw materials or finished goods, the firms dealing directly with that middle enterprise should be susceptible to primary employee picketing. Only when the striking employees or their union sought to enlist the assistance of persons employed by secondary parties that did not have direct relationships with the target entity or its contrived agents should their conduct be considered impermissible.

169. 29 U.S.C. § 158(e) (1988).

Business groups would undoubtedly challenge any attempt to widen the secondary appeals that could be made by striking employees. They realize that they enjoy the superior economic position, and they do not want to let legislative changes redress the substantial imbalance that currently exists. Nonetheless, if Congress seriously believes that viable labor organizations are indispensable instruments of industrial democracy, it must increase the economic leverage available to such entities. It must provide workers with the capacity to confront employers on a relatively equal basis.

If congressional or corporate leaders are truly concerned about production losses caused by work stoppages, they can support alternative proposals. One would amend the NLRA to proscribe economic strikes and mandate the use of binding interest arbitration procedures to resolve collective bargaining impasses. The statute would authorize the appointment of tri-partite arbitral panels that would be empowered to select the more reasonable final offer made by the employer or the union, either on an "issue-by-issue" basis or a "total package" approach. Various state public sector bargaining laws have successfully employed interest arbitration procedures as a substitute for prohibited strike activity.[170]

Congress could alternatively amend the NLRA to permit only "statutory strikes" that would not entail actual work stoppages.[171] Once a bargaining impasse was reached, the employer or the labor organization could declare a "strike." Production and services would continue as usual, but employee wages would be reduced by a specified amount (*e.g.*, twenty-five percent) and company revenues would be reduced by a similar percentage. If the parties resolved their dispute promptly, the withheld compensation and revenues could be returned to the workers and the firm. If the controversy was not settled quickly, however, the withheld funds could be permanently transferred to the public treasury. Even though "statutory strikes" would not involve work disruptions, the financial incentives associated with such a plan would encourage labor and management representatives to resolve their bargaining disputes expeditiously.

During the 1980s, the Labor Board deprived unorganized employees of certain rights that unionized personnel possess. Even though the "constructive concerted activity" doctrine that extends statutory protection to individual workers who complain about matters of presumed interest to fellow employees[172] protects unionized workers, the NLRB's *Meyers Industries*[173] holding restricted the scope of NLRA protection available to nonunion personnel. Individuals who question safety conditions or file complaints with state or federal regulatory agencies are not insulated from retaliatory employer discipline under the NLRA, unless they either act in direct concert with other

170. *See* Charles B. Craver, *Public Sector Impasse Resolution Procedures*, 60 CHI.-KENT L. REV. 779, 783–85 (1984).

171. *See generally* David B. McCalmont, *The Semi-Strike*, 15 INDUS. & LAB. REL. REV. 191 (1962); George W. Goble, *The Non-Stoppage Strike*, 2 LAB. L.J. 105 (1951); Howard O. Marshall & Natalie J. Marshall, *Nonstoppage Strike Proposals—A Critique*, 7 LAB. L.J. 299 (1956).

172. *See* Interboro Contractors, 157 N.L.R.B. 1295, 1298–99 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). This basic doctrine was sustained by the Supreme Court in NLRB v. City Disposal Sys., 465 U.S. 822 (1984).

173. 268 N.L.R.B. 493, 495–97 (1984).

workers or assert rights codified in existing bargaining agreements. Congress should amend the NLRA to make it clear that unorganized individuals who raise issues of obvious interest to other employees with their employer or with regulatory bodies shall be considered engaged in "constructive concerted activity" and be entitled to protection under Section 7.[174]

The Supreme Court held in *NLRB v. Weingarten, Inc.*[175] that organized employees can request the assistance of shop stewards at investigatory interviews they reasonably fear may result in discipline. Although the Labor Board initially extended this statutory protection to nonunion personnel,[176] it subsequently held that unorganized workers do not have the right to ask for the assistance of fellow employees at such interviews.[177] Since this distinction between union and nonunion personnel has no foundation in the language of Section 7, Congress should amend that provision to make it clear that both organized and unorganized employees have the right to ask for the support of other persons during such investigatory interviews.

The Supreme Court and the Labor Board have unduly restricted the scope of bargaining available to representative labor organizations. The balancing tests enunciated in *First National Maintenance Corp. v. NLRB*[178] and in *Dubuque Packing Co.*[179] ignore the fact that the NLRA was originally enacted for the purpose of providing employees with the opportunity to influence management decisions that would affect their employment conditions. The NLRA was designed to enable represented personnel to deprive corporate officials of the right to make unilateral determinations with respect to issues of direct relevance to bargaining unit members.[180] Congress should amend Section 8(d)[181] to clarify that designated bargaining agents possess the statutory prerogative to negotiate about all company decisions that will have a meaningful impact upon employee "wages, hours, and other terms and conditions of employment." Proposed decisions pertaining to such topics as subcontracting, production transfers, partial closures, and the introduction of new technology should all be subject to mandatory bargaining.

The fact that employers might find such negotiations inconvenient or cumbersome should not be determinative. The relatively slight infringement of managerial authority associated with such mandatory bargaining would be outweighed by the right of unionized employees to participate in the decision-making process. This expanded scope of bargaining would not enable intransigent labor organizations to prevent management decisions that displease bargaining unit personnel. Employers would merely be obliged to notify representative unions of proposed changes and provide these entities with the opportunity to discuss the pertinent issues. They would not be required to make any

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174. *See generally* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989).

175. 420 U.S. at 260–64.

176. *See Materials Research Corp.*, 262 N.L.R.B. at 1013–15.

177. *See Sears, Roebuck & Co.*, 274 N.L.R.B. at 230.

178. 452 U.S. 666 (1981). *See supra* notes 117–18 and accompanying text.

179. 303 N.L.R.B. No. 66, 137 L.R.R.M. 1185 (1991). *See supra* note 119 and accompanying text.

180. *See* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1558 (1981).

181. 29 U.S.C. § 158(d) (1988), set forth *supra* note 8.

concessions or to agree to any proposals.[182] If employee representatives refused to accommodate employer needs and a good faith impasse arose, management could implement the position rejected by union leaders at the bargaining table.[183]

The ability of representative labor organizations to obtain beneficial contract terms directly relates to their capacity to preserve bargaining unit solidarity. Although the Supreme Court previously recognized that unions can discipline members who cross picket lines to work during strikes,[184] it held in *NLRB v. Textile Workers Granite State Joint Board*[185] that labor entities cannot lawfully discipline individuals who engage in strike-breaking activity after they resign from the union. Furthermore, in *Pattern Makers' League of North America v. NLRB*,[186] the Court ruled that labor organizations may not impose restrictions on the right of members to resign during job actions. These two decisions have severely undermined the ability of representative unions to maintain solidarity during work stoppages.

In *Machinists Local 1327*,[187] three members of the Labor Board indicated that a rule that would only permit member resignations to become effective thirty days following their submission might be acceptable under the NLRA, and the Ninth Circuit wholly agreed with this suggestion.[188] Congress should recognize the fact that labor organizations are democratic institutions. While members may oppose proposed concerted activity, they should not be free to ignore the affirmative vote of a majority of their cohorts. Unions should be permitted to impose reasonable restrictions upon the right of members to resign during on-going job actions. Congress should amend Section 8(b)(1)(A)[189] to provide representative labor organizations with the right to prevent member resignations from taking effect before the passage of thirty days after their submission. Such a rule would preserve worker solidarity during the early stages of economic strikes, and would insulate dissenters from discipline after thirty days.

Labor organization solidarity has been similarly undermined by Supreme Court decisions restricting the right of those institutions to expend dues money received from employees covered by lawful union security agreements. In *Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*[190] and *Lehnert v. Ferris Faculty Assn.*,[191] the Court held that representative unions may not use dues money obtained from objecting members to support such things as union organizing, litigation not related to the immediate bargaining unit, or lobbying efforts. Even though private sector labor organizations derive their representational status from the NLRA, they are not government entities. As a result, they are not subject to the constitutional restrictions that affect public institu-

182. *See* Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 86–87 (1988).
183. *See* NLRB v. Katz, 369 U.S. 736, 741–45 (1962).
184. *See Allis-Chalmers Mfg. Co.*, 388 U.S. at 178–95.
185. 409 U.S. at 215–18.
186. 473 U.S. at 104–12.
187. 263 N.L.R.B. 984, 987 (1982).
188. *See Machinists Local 1327*, 725 F.2d at 1217–18.
189. 29 U.S.C. § 158(b)(1)(A) (1988), set forth *supra* note 63.
190. 466 U.S. at 448–55.
191. 111 S. Ct. at 1960–65. *See supra* notes 125–28 and accompanying text.

tions. The NLRA should thus be amended to permit unions to expend dues money for non-political and non-ideological purposes that advance worker rights, even if they do not immediately concern the negotiation and administration of the collective contract covering the instant unit of employees.

Representative unions should certainly be able to use the dues money received from objecting members to organize new groups of workers. The ability of unorganized companies to obtain a competitive advantage through the availability of reduced labor costs directly threatens the job security, compensation levels, and employment terms unionized personnel enjoy. To the extent labor organizations are able to organize most or all members of an industry, they enhance the job security and working conditions of employees covered by collective contracts.

Litigation involving external bargaining units may similarly benefit individuals in the immediate unit. Test cases involving wage and hour laws, health and safety regulations, civil rights statutes, and a myriad of other employment-related enactments are likely to generate judicial precedents that will assist all workers. It would thus be appropriate to permit representative labor unions to expend dues money received from one bargaining unit to finance litigation involving the employment rights of other groups of workers. In most, if not all, such cases, the labor union would merely attempt to obtain through litigation benefits and protections it would otherwise have to achieve through the collective bargaining process.

Unions should also be allowed to spend dues money to support lobbying efforts designed to advance the employment rights of all workers. While it would be improper to permit labor entities to expend the dues money of objecting members to finance political parties or particular candidates, or to proselytize in favor of or against such ideological issues as abortion or aid to parochial schools, they should be able to utilize dues revenues to support lobbying intended to enhance employment interests. The collective bargaining function properly includes efforts to increase the minimum wage, to improve health and safety protections, to extend unemployment compensation coverage, to proscribe invidious forms of discrimination, to prevent unjust dismissals, or to protect employees displaced by new technology or job relocations. To the extent legislation can be obtained to cover these employment-related topics, representative unions would find it easier to advance other worker objectives through the bargaining process.

An additional area of NLRA coverage must be changed to encourage the development of more cooperative forms of labor-management relations. In recent years, an increasing number of employers have adopted, either unilaterally or through collectively bargained plans, various worker participation programs.[192] These companies have recognized that contemporary employees are better educated and more mobile than their predecessors. They tolerate less job tedium and demand the right to participate directly in managerial deliberations that will meaningfully affect their employment destinies.[193]

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192. *See* Craver, *supra* note 129, at 673–82, and authorities cited therein.

193. *See* JOHN SCHMIDMAN, UNIONS IN A POSTINDUSTRIAL SOCIETY 143 (1979); HARISH C. JAIN, WORKER PARTICIPATION 3 (1980).

Shop level quality of work life programs have been developed to provide workers with input concerning their immediate employment circumstances. Cooperative work groups consisting of rank-and-file employees and management personnel discuss production methods and scheduling. These systems have usually been similar to the different types of plans that were previously adopted in countries such as Germany, Sweden, Austria, Denmark, and Norway.[194] These worker participation ventures have challenged the traditional adversarial model of industrial relations. Managers have had to learn to lead through earned respect instead of through autocratic control, while union officials have had to adjust to less confrontational roles and to acknowledge the labor cost and productivity concerns of business firms. A few cooperative programs have even included worker representation on corporate boards.[195] These arrangements have permitted direct employee input at the apex of managerial authority.

The expanded adoption of shop level employee-management committees and the increased election of worker representatives to corporate boards challenge one of the fundamental assumptions underlying the NLRA—the adversarial nature of labor-management relationships. To guarantee the appropriate separation of labor and management, Section 8(a)(2)[196] prohibits employer domination or support of labor organizations. Section 2(5)[197] broadly defines the term "labor organization" to include "any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." If these NLRA provisions are rigidly applied to innovative employer-employee arrangements, cooperative ventures may be severely restricted.[198] On the other hand, if disingenuous employers are permitted to utilize such devices either to weaken existing bargaining representatives or to discourage organizing efforts by nonunion employees, they could undermine one of the basic objectives of the NLRA.

An appropriate balance of the competing interests was articulated by the Ninth Circuit in *Hertzka & Knowles v. NLRB*,[199] wherein the court concluded that a Section 8(a)(2) violation must "rest on a showing that the employees' free choice ... is stifled by the degree of employer involvement at issue."[200] The court further recognized that the automatic condemnation of cooperative programs "would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, ... it [is] unobjectionable under the Act."[201] So long as cooperative labor-management plans are established in a bona fide effort to provide employees with significant participation in the deci-

194. *See* Craver, *supra* note 130 at 676–77, and authorities cited therein.
195. *See id.* at 680–82.
196. 29 U.S.C. § 158(a)(2) (1988), set forth in *supra* note 33.
197. 29 U.S.C. § 152(5) (1988).
198. *See, e.g.*, John Schmidman & Kimberlee Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772 (1984).
199. 503 F.2d 625 (9th Cir. 1974).
200. 503 F.2d at 630.
201. *Id.* at 631.

sion-making process and their statutory right to select a bargaining representative is not deliberately discouraged, no Section 8(a)(2) violation should be found.[202] When cooperative programs are developed through the negotiation process, they should be presumptively appropriate. Only when employers unilaterally establish such programs for the purpose of chilling or precluding employee organizing should Section 8(a)(2) be applied.

Although recent Labor Board decisions have appropriately acknowledged the propriety of cooperative arrangements under the NLRA,[203] it is not certain that bona fide employer-employee committees will continue to receive statutory exemption. Congress should encourage the creation of enlightened cooperative ventures by amending Section 8(a)(2) to exempt employer-employee committees or plans that are not designed to discourage the exercise of protected rights under the NLRA.

B. Remedial Changes

The remedial scheme under the NLRA is biased in favor of employers. The primary reason for this statutory imbalance concerns the fact that an extremely pro-business Congress added the most potent unfair labor practice remedies to the NLRA in 1947. When the Labor–Management Relations Act amendments were adopted, most of the new remedial provisions pertained to violations committed by labor organizations, and not those perpetrated by employers. For example, the new Section 10(l)[204] specified that charges involving secondary union activity under Section 8(b)(4) or 8(e) or regarding organizational or recognitional picketing under Section 8(b)(7) shall be handled on a priority basis. Whenever an employer alleges a violation of one of these provisions, the Labor Board must seek an immediate injunctive order against the offending union behavior. This protects the employer's interests while the subsequent unfair labor practice proceedings are conducted. If the NLRB fails to seek a restraining order against such proscribed union activity, the affected business firm may petition a district court for a writ of mandate ordering the Board to do so.[205]

In contrast, employers that commit unfair labor practices are not subject to mandatory injunctive orders. If a charge alleging a violation of Section 8(a) by a business entity is filed and the NLRB decides to issue a complaint, the Board may seek a preliminary injunction against the offending conduct under Section 10(j).[206] The Board is not statutorily obliged to seek such relief, and if it declines to do so, the adversely affected employees or labor organization cannot compel that agency to do so. The Labor Board rarely seeks preliminary relief against employer unfair labor practices under Section 10(j).

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202. *See* William E. Fulmer & John C. Coleman, *Do Quality-of-Work Life Programs Violate Section 8(a)(2)?*, 35 LAB. L.J. 675 (1984).

203. *See, e.g.*, Anamag, 284 N.L.R.B. 621 (1987); General Foods Corp., 231 N.L.R.B. 1232 (1977).

204. 29 U.S.C. § 160(l) (1988).

205. *See* Terminal Freight Handling Co. v. Solien, 444 F.2d 699, 703–04 (8th Cir. 1971), *cert. denied*, 405 U.S. 996 (1972). Section 303 of the Labor–Management Relations Act, 29 U.S.C. § 187 (1988), provides employers with additional protection against secondary conduct by authorizing federal courts to award damages to parties injured by Section 8(b)(4) violations.

206. 29 U.S.C. § 160(j) (1988).

The number of employer unfair labor practices has increased dramatically over the past ten to fifteen years.[207] It has become relatively common for companies counteracting union organizing drives to discharge the employees leading the collectivization efforts. If firms terminate such individuals publicly and flagrantly, they may provoke an unprotected response from the discriminatees and avoid the obligation to reinstate those persons,[208] and they will certainly chill union support among the remaining employees. If the company prevents the labor entity from attaining majority status, it does not have to worry about any remedial bargaining order, no matter how outrageous its violations.[209]

Corporations that ignore the rights of their employees under the NLRA are generally motivated by the fact that they consider the relatively minimal costs associated with unfair labor practice liability to be outweighed by the overall costs they associate with worker unionization. These corporations completely ignore the moral and systemic ramifications of their unlawful conduct, and they take advantage of the fact that Labor Board remedies with respect to discriminatory terminations are wholly inadequate. The sole monetary remedy involves a Board order requiring the offending party to make the discriminatees whole for the compensation they have lost. The unlawfully fired individuals must seek interim employment to minimize their economic loss during the pendency of the NLRB proceedings.[210] Labor Board reinstatement orders are not particularly effective. Only about 40% of discriminatees actually accept offers of reemployment, and, of those who do, approximately 80% leave their employer within two years.[211]

Companies that commit flagrant unfair labor practices during organizing drives may find themselves encumbered by remedial bargaining orders if the adversely affected labor organizations can demonstrate that they obtained majority support despite the employer violations. Nonetheless, such remedial directives are often ineffectual. Only about 35–40% of unions that obtain remedial bargaining orders ever achieve collective contracts.[212] Furthermore, the more vigorously employers oppose the effectuation of such remedial orders through judicial appeals the less likely that the labor union will achieve an initial bargaining agreement.[213]

Even when companies do not employ coercive tactics and unions successfully attain Labor Board certification, this does not guarantee fruitful negotiations. Recalcitrant employers can simply refuse to accede to worker demands. Even if they do so in complete bad faith, the most they need fear from the NLRB is a cease and desist order that will take several years for the

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207. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 238–39 (1990); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 961–69 (1991).

208. *See Clear Pine Mouldings*, 268 N.L.R.B. at 1045–47.

209. *See* Gourmet Foods, Inc., 270 N.L.R.B. 578, 583–87 (1984).

210. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

211. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1792 (1983).

212. *Id.* at 1795, n.94.

213. *See generally* Benjamin Wolkinson, *The Remedial Efficacy of NLRB Remedies in Joy Silk Cases*, 55 CORNELL L. REV. 1 (1969).

petitioning labor organization to obtain and have judicially enforced.[214] By the time meaningful relief is provided, crucial organizing momentum is lost, and union effectiveness is often permanently diluted.

If the negation of NLRA rights by business entities is to be reversed, more efficacious remedial approaches must be enacted. To deter the crippling impact of Section 8(a)(3) discharges, Congress should adopt a liquidated damages provision similar to Section 16(b) of the Fair Labor Standards Act[215] which authorizes double backpay awards to employees who have been denied the minimum wage or premium pay for overtime work. If the Labor Board were empowered to award double or triple backpay to individuals terminated unlawfully during organizing campaigns, this would increase the cost of employer noncompliance.

To minimize the loss of organizing momentum associated with the illegal termination of key union supporters, Congress should amend Section 10(l) making that mandatory injunction provision applicable to Section 8(a)(3) discharges occurring during organizing campaigns. As soon as a charge is filed and the Board has reason to believe it is meritorious, the NLRB should be statutorily obliged to seek an immediate injunctive order directing the offending employer to reinstate the adversely affected individuals. If such persons were promptly returned to their former positions, the negative impact of the employer's violations would be minimized.

Congress should amend the NLRA to authorize the Labor Board to issue remedial bargaining orders in favor of labor organizations that were unlawfully prevented from obtaining majority support because of extreme employer unfair labor practices. To avoid the imposition of an exclusive bargaining agent upon employees who do not really desire such representation, remedial bargaining orders should only be employed in extraordinary situations. Nonetheless, when the Board is satisfied that majority status would most likely have been achieved in the absence of the company's egregious violations, it should be empowered to protect the rights of the discouraged union supporters through the issuance of a bargaining directive.[216]

When employers indefensibly refuse to bargain in good faith with newly certified unions or labor organizations that will clearly receive remedial bargaining orders, the Labor Board should be similarly directed under Section 10(l) to seek preliminary injunctive orders. These would force the recalcitrant business entities to bargain with the designated labor organizations while the meritless unfair labor practice proceedings are being exhausted. Such an approach would deny business enterprises the opportunity to disregard the collective rights of their employees during the several years it takes to obtain a judicially enforced Labor Board order.

In cases involving wholly unjustifiable employer refusals to bargain, make-whole relief should be available to place the unlawfully disenfranchised

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214. Once such Labor Board bargaining orders are judicially enforced, continued contumacy by employers would subject them to contempt liability.

215. 29 U.S.C. § 216(b) (1988).

216. *See generally*, David S. Shillman, Note, *Nonmajority Bargaining Orders: The Only Effective Remedy for Pervasive Employer Unfair Labor Practices During Union Organizing Campaigns*, 20 U. MICH. J.L. REF. 617 (1987).

workers in the economic position they probably would have attained in the absence of the company's flagrant disregard for their NLRA rights. Because the NLRB has decided that it lacks the statutory authority to provide this relief,[217] Congress should amend Section 10(c) of the NLRA[218] to empower the Board to award such compensatory relief.

C. Undue Labor Board Deferral to Arbitral Procedures

A final area of Labor Board authority must be briefly addressed. Although the NLRB is empowered in Section 10(a) of the NLRA[219] to resolve unfair labor practice disputes and that provision states that the Board's power in this regard "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," the Board has increasingly declined to perform this function. In *Spielberg Manufacturing*,[220] the Labor Board decided that it would defer in unfair labor practice cases to previously issued arbitral determinations that involved the same factual circumstances and effectively resolved the issues raised in the unfair labor practice case. The NLRB would accept the prior arbitral results where those proceedings were "fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel [was] not clearly repugnant to the purposes and policies of the [NLRA]."[221] The party that sought NLRB deferral to a prior arbitral decision was obliged to demonstrate that the *Spielberg* prerequisites were satisfied. This policy was designed to enhance respect for arbitral determinations and to reduce the need for superfluous Labor Board adjudications.

The *Spielberg* deferral policy was significantly expanded in *Olin Corp.*,[222] wherein the Labor Board enunciated new standards to be applied when deciding whether to accept a previous arbitral determination in a current unfair labor practice proceeding:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice .... [W]ith regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer. Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determina-

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217. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 108–10 (1970), *enforced,* 449 F.2d 1058 (D.C. Cir. 1971).

218. 29 U.S.C. § 160(c) (1988) empowers the Labor Board to issue remedial orders that will effectuate the policies of the NLRA.

219. 29 U.S.C. § 160(a) (1988).

220. 112 N.L.R.B. 1080 (1955).

221. *Id.* at 1082.

222. 268 N.L.R.B. 573 (1984).

> tion of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.[223]

The *Olin* rules make it exceedingly difficult for parties to challenge prior arbitration decisions not entirely compatible with NLRA policies.[224] The burden of proof has been transferred from the party seeking acceptance of the previous arbitral findings to the party opposing such acceptance. The mere fact that the arbitrator's interpretation or application of NLRA principles has not been completely consistent with established Labor Board doctrines is no longer controlling. So long as the arbitral determination is not "palpably wrong," it is entitled to NLRB affirmation. Such expansive deference causes the development of inconsistent legal principles that may not provide individual employees with protection as broad as that envisioned by Congress when it enacted the NLRA. It is also important to recognize that courts reviewing arbitral decisions must enforce those awards so long as they "draw their essence" from the bargaining agreement and are not clearly repugnant to law or public policy.[225] Such judicial deference greatly exceeds that accorded to Labor Board unfair labor practice determinations.[226]

The *Spielberg* deferral policy is especially appropriate where purely factual issues are in dispute, because it reasonably enhances the federal labor policy favoring the private resolution of labor controversies,[227] and it prevents unnecessarily duplicative litigation. Nonetheless, to ensure that the prior arbitral proceedings are truly "fair and regular" and that the award is not "repugnant to the purposes and policies of the [NLRA]," deferral should only be employed where the party seeking deferral can demonstrate that these prerequisites have been satisfied. Congress should amend Section 10(a) to codify the original *Spielberg* standards, and to reject the overly expansive *Olin Corp.* approach. This would clarify that the Labor Board should not accept a prior arbitral award unless the *Spielberg* criteria have been completely met.

The NLRB frequently refuses to consider unfair labor practice claims where no previous arbitral determinations have been issued. When unfair labor practice charges are filed that raise issues that might be resolved through available contractual grievance-arbitration procedures, the Labor Board regularly declines to hear the controversy. Under the *Collyer Insulated Wire*[228] doctrine, if the respondent indicates its willingness to have the dispute submitted to the arbitral process, the Board usually withholds its statutory authority and directs the parties to arbitrate. In *General American Transportation Corp.*,[229] the NLRB appropriately acknowledged that such pre-unfair labor

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223. *Id.* at 574.

224. The Labor Board will even defer in unfair labor practice cases to negotiated grievance adjustments that do not provide the affected employees with the full relief to which they would be entitled in an NLRA proceeding. *See* Alpha Beta Co., 273 N.L.R.B. 1546 (1985), *petition denied*, 808 F.2d 1342 (9th Cir. 1987); Roadway Express, Inc., 246 N.L.R.B. 174 (1979).

225. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596–99 (1960).

226. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

227. Section 203(d) of the LMRA, 29 U.S.C. § 173(d) (1988), provides that "[f]inal adjustment by a method agreed upon by the parties hereby is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

228. 192 N.L.R.B. 837, 841–42 (1971).

229. 228 N.L.R.B. 808 (1977).

practice hearing deferral is particularly proper where Section 8(a)(5) or 8(b)(3) refusal to bargain charges are involved. In such cases, the institutional rights of the representative labor organization are to be determined, and resolution of the underlying contractual question—which will simultaneously dispose of the unfair labor practice issue—will be made in the forum the parties chose to hear such controversies. Nonetheless, when individual rights are raised under provisions such as Section 8(a)(1), 8(a)(3), 8(b)(1)(A), or 8(b)(2), the interests of the aggrieved employee may not coincide with those of either the employer or the representative union which controls the arbitral process. Application of the *Collyer* deferral policy to such cases may sacrifice the individual rights Congress so carefully created in Section 7 of the NLRA. The Labor Board previously recognized this crucial distinction between cases concerning individual rights and those involving organizational rights in *General American Transportation*, wherein it indicated that *Collyer* deferral should be restricted to Section 8(a)(5) and 8(b)(3) refusal to bargain charges.

In *United Technologies*,[230] the Board revitalized the previously discarded *National Radio Co.*[231] doctrine favoring deferral in Section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) situations. This policy reversal effectively deprives allegedly coerced individuals of access to the administrative agency Congress created to resolve unfair labor practice cases. Congress should amend Section 10(a) to codify the *General American Transportation* approach and limit pre-arbitration deferral to cases involving refusal to bargain allegations. Such an amendment would guarantee individual employees the right to have their claims presented by independent Labor Board attorneys before the tribunal that possesses substantial NLRA expertise and whose members have not been selected by the employer and the labor organization involved. A continuation of the *United Technologies* rule will increasingly prevent a neutral determination of the underlying legal issues, because many representative labor organizations will be unable to afford the high costs of arbitration. Even where a union declines to invoke arbitration because of bona fide monetary constraints or other good faith considerations, the NLRB still refuses to assert unfair labor practice jurisdiction.[232] This result is inconsistent with the unfair labor practice authority Congress extended to the Labor Board in Section 10(a).

V. CONCLUSION

The enactment of the NLRA in 1935 provided American workers with basic organizational and collective bargaining rights. Early Labor Board and court decisions extended the statutory prerogatives and protections available to employees and to labor unions. Subsequent statutory amendments and Board and court decisions have diminished NLRA coverage and eroded the benefits provided by that enactment. Remedial orders fail to provide individuals and labor organizations with meaningful protection against employer unfair labor practices. This encourages unscrupulous companies to ignore their legal obligations. Corporate antipathy toward the organizational rights of employees has contributed to the substantial decline in union strength. In order to pre-

230. 268 N.L.R.B. 557, 558–60 (1984).
231. 198 N.L.R.B. 527 (1972).
232. *See* United Beef Co., 272 N.L.R.B. 66 (1984).

serve industrial democracy, Congress must amend the NLRA to extend coverage to those workers who really need collective strength to counterbalance the power of their corporate employers. Congress must also expand the substantive rights provided by that enactment and enhance the efficacy of available Labor Board remedies. Without these changes, the American labor movement may become an ineffective economic and political force by the end of the current decade.